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No. 84-2036

In the

Supreme Court of the United States

October Term, 1985

MAHFOUZ EL SHAHAWY, M.D.,

Petitioner,

vs.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD, SARASOTA, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The
District Court of Appeal of Florida, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the denial of medical staff and clinical privileges to a local physician by a Florida local administrative agency (while acting in its quasi-judicial capacity) which owns and operates a local public hospital. The question presented is:

> Whether the state court erred because it denied petitioner leave to amend an initial pleading and thereby limited petitioner to traditional review of local agency action, rather than allowed petitioner to collaterally attack the agency action through a declaratory judgment proceeding.

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Respondent, Sarasota County Public Hospital Board, respectfully prays that the Court deny the petition for a writ of certiorari to review the decision of the District Court of Appeal of Florida, Second District.

STATEMENT OF CASE

This case involves a limited question of Florida procedural law—whether the trial court erred in denying petitioner leave to amend his complaint. It emanates from, and is inextricably intertwined with, a related action, *Shahawy v. Sarasota County*

Public Hospital Board, case no. 84-115 (Fla. 12th Jud. Cir. filed Jan. 10, 1984) (hereafter "the related action"). Because of the procedural quagmire below, a detailed explanation of the related action and the present case is essential to a complete understanding of the issue before the Court.

Respondent, Sarasota County Public Hospital Board (the Board), is a local administrative agency created by special act of the Florida Legislature for the purpose of owning and operating Memorial Hospital, Sarasota (the hospital). 1949 Fla. Laws ch. 25468 (Spec. Acts). Petitioner, Mahfouz El Shahawy (Shahawy), is a medical doctor and was formerly a member of the hospital's medical staff.

In the related action, the Hospital Board revoked for incompetence Shahawy's clinical privileges to perform Swan-Ganz Procedures (a type of right-side heart catheterization) and denied for disruptive reasons Shahawy's reappointment to the hospital's medical staff. (Resp. App. 76-90) The Board's decision was reached after a *de novo* hearing by the Board acting in its quasi-judicial capacity as a Florida administrative agency. (Resp. App. 76-90) At the hearing, held October 24-26 1983, Shahawy was represented by counsel, presented evidence, cross-examined witnesses, and was afforded other procedural due process guarantees in full compliance with constitutional requirements, the Board's bylaws, and Florida statutory law. (Resp. App. 84-86) After the hearing, the Board made full findings of fact and conclusions of law setting forth in detail the reasons for its action. (Resp. App. 84-90)

Shahawy instituted the present case three days before the scheduled board hearing, for the *sole* purpose of obtaining an injunction to stop the hearing from taking place. (R. 1-13) The petition for injunctive relief was heard before the Florida circuit court, sitting in its capacity as a court of original juris-

diction, [1] on the morning of the scheduled Board hearing. (R. 14) The court denied the injunction and the Board hearing proceeded as scheduled.

Disappointed with the decision reached by the Board in the related action, Shahawy sought appellate review by application for writ of common law certiorari to the Florida circuit court (Resp. App. 5-20), this time sitting in its appellate capactiy. [2] The circuit court subsequently issued an order to show cause and the appeal was fully briefed and set for oral argument. (Resp. App. 5-20, 21, 22-71, 91-113)

On May 22, 1984, eight months after the court had denied Shahawy's initial petition for injunction to stop the Board hearing, almost four months after appeal by certiorari was filed in the related action, and one month after the related action's appeal had been fully briefed, Shahawy moved to amend his initial petition for injunction. (R. 54-55) The proposed amended petition sought to collaterally attack the Hospital Board's action by a separate *de novo* court action for declaratory judgment. (R. 56-59) The circuit court denied the motion to amend (R. 75; Pet. App. 3-3A) and Shahawy

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[1]The Florida Constitution establishes four branches of state courts: The Supreme Court of Florida, the district courts of appeal, the circuit courts, and the county courts. The supreme court and district courts of appeal have appellate jurisdiction only; the county courts have original jurisdiction only. The circuit courts have original and appellate jurisdiction. Fla. Const., art. V.

[2]In Florida, appellate review of local agency action is had by appeal ("common law certiorari") to the circuit court. DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957). Such review is nondiscretionary and available as a matter of right. *See* Cherokee Crushed Stone, Inc., v. City of Miramar, 421 So. 2d 684 (Fla. 4th DCA 1982).

appealed the denial to the Florida Second District Court of Appeal (the Florida appellate court) (R. 76). That court affirmed without written opinion. (Pet. App. 2) It is only this affirmance without written opinion which Shahawy now asks this Court to review. (Pet. 1-5)

Before this appeal was briefed in the Florida appellate court, petitioner dismissed the appeal by certiorari in the related case (Pet. Supp. App., lodged with clerk, 125-127), only three days before oral argument was to be held on August 30, 1984 (Resp. App. 114).

SUMMARY OF ARGUMENT

Shahawy's petition for certiorari seeks in reality a second appellate review of his case. In fact, with few alterations, pages 7-39 of the petition are nothing more than reiteration of Shahawy's brief and motion for rehearing filed in the Florida appellate court. (*see* Pet. Supp. App., lodged with clerk, 128-164) Those pages attempt to explain why the Florida court was wrong under state law. No federal question or citation to controlling federal authority are presented.

The last eight pages of the petition address, in limited fashion, petitioner's sole reason why this Court should review the case—petitioner asserts that the Florida appellate court's decision conflicts with a decision from a federal court of appeals, with a decision of a state court of last resort, and with several decisions of this Court. This brief in opposition sets forth three significant factors which strongly militate against the exercise of this Court's discretionary jurisdiction. Each demonstrates the absence of an important federal question.

First, the Florida appellate court rendered its decision without written opinion. Thus, no precedent was established and no conflict of decisions, as required by rule 17, was

created. In any event, the cases cited by petitioner are dissimilar to this case and do not present a clash of decisions.

Second, petitioner has seriously misstated and omitted facts essential for full and adequate review. Each of these misstatements and omissions will require record inquiry and resolution before any definitive policy decision can be reached.

Third, a review of the procedural factors before the Florida trial and appellate courts discloses that those courts applied well-settled principles of state law in rendering their decisions. The record discloses that petitioner had full and adequate review of administrative action by direct appeal. After pursuing that appeal to the last step before judicial resolution, petitioner attempted to circumvent the established process of review by collateral attack. The lower courts were correct in refusing to allow such an attack.

In short, the decision below presents no special or important federal question or policy determination which dictates review here. The issues presented are significant only to the parties to the proceeding. The application for writ of certiorari should be denied.

ARGUMENT
REASONS FOR DENYING WRIT

A. The Decision Below Does Not Conflict With Decisions Of This Court Or Other Courts.

Petitioner's sole reason for asserting jurisdiction in this Court is that the decision of the Florida appellate court conflicts with a decision of a federal court of appeals, conflicts with a decision of a state court of last resort, and conflicts with decisions of this Court. (Pet. 44-47) Contrary to petitioner's assertion, the decision of the state appellate

court does not and cannot conflict with any decision of any court on any grounds. Indeed, the appellate court rendered no written opinion; the decision in its entirety reads: "PER CURIAM. Affirmed." (Pet. App. 2) Such affirmance without written opinion has no precedential value. *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). In fact, that is the precise reason why such a decision is not reviewable in the Florida Supreme Court. *Id.; Dodi Publishing Co. v. Editorial America, S.A.*, 385 So 2d 1369 (Fla. 1980). Without a written opinion and without precedential value, it is difficult to perceive how the Florida court's decision could set forth an important federal issue or cause a conflict of decisions which mandates critical review under this Court's extraordinary jurisdiction.

Additionally, even if the Florida court's affirmance without opinion could constitute a basis for conflict, the cases cited by petitioner do not demonstrate any disagreement among the courts. The federal appeals court case cited for conflict is *Aetna State Bank v. Altheimer*, 430 F.2d 750 (7th Cir. 1970). While we question the continuing validity of *Aetna*, [3] the decision is nevertheless distinguishable. In *Aetna*, defendant moved to "abate" a federal court action based upon the pendency of an almost identical state court action between the same parties. The *Aetna* court held that, in abatement, a court should only stay, not dismiss, the action until the related action is

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[3]The Seventh Circuit overruled *Aetna* in Calvert Fire Ins. Co. v. Will, 560 F.2d 792 (7th Cir. 1977). The latter case was, in turn, reversed by this Court. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (plurality opinion). Because this Court did not revive *Aetna* in *Calvert*, and because the reversal in *Calvert* hinged upon a different issue (abuse of the lower court's mandamus powers), *Aetna's* continuing vitality is dubious.

terminated. This holding, which is a product of federal procedural law of questionable value here, presupposes concomitant jurisdiction. *Id.* at 754-755. As we shall see, under the present facts, jurisdiction was only proper in one proceeding, the related action. *See infra. at* 11-12.

The decision of a state court of last resort which petitioner cites for conflict is *Aberdeen Restaurant Corp. v. Gottfried,* 158 Misc. 785, 285 N.Y.S. 832 (Sup. Ct. 1935). That decision, however, was rendered by a New York trial court and cannot be a basis of conflict under rule 17.

The remaining cases cited are decisions of this Court. While most deal with some aspect of due process, none address the point now presented. Even a cursory review of those cases makes this clear: *Duncan v. Louisiana,* 391 U.S. 145 (1968) (due process guarantees right to jury trial in misdemeanor cases); *Malloy v. Hogan,* 378 U.S. 1 (1964)(exercising privilege against self-incrimination is not a basis for contempt); *Snyder v. Massachusetts,* 291 U.S. 97 (1934) (court's refusal to allow defendant to accompany jury to scene of crime does not violate due process); *Powell v. Alabama,* 287 U.S. 45 (1932)(due process requires reasonable time to secure counsel in criminal proceedings); *Blackmer v. United States,* 284 U.S. 421 (1932) (in contempt proceedings, due process is satisfied by suitable notice and adequate opportunity to be heard); *Hardware Dealer's Mutual Fire Insurance Co. v. Glidden Co.,* 284 U.S. 151 (1931) (mandatory arbitration of insurance contract dispute does not violate due process); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930) (due process extends to state court actions). Without addressing the point now presented, these cases cannot be in conflict.

B. The Petition Seriously Misstates And Omits Facts Critical For Meaningful Review.

This Court is not in the business of canvassing the record in each case to discern essential facts or to correct a party's mischaracterization thereof. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Yet, petitioner herein asks the Court to do exactly that by misstating, mischaracterizing, and omitting facts critical for review. Such misconduct is reason for denying certiorari. *Conway v. California Adult Authority,* 396 U.S. 107 (1969); *cf. Davis v. Jacobs,* 454 U.S. 911 (1981).

First, petitioner states that his initial petition (to stop the board hearing) was for "injunctive" *and* "declaratory" relief. (Pet. 7, 19) On the basis of this statement, petitioner spins his "before-filed"/"after-filed" and his "wrongful abatement" arguments. (Pet. 19, 30-33) Even the question presented, as framed by petitioner, depends thereon. (Pet. 0) However, a review of the initial petition discloses that only injunctive relief, *not* declaratory relief, was requested. (R. 56-59) The petitioner's brief is blatantly deceptive in maintaining otherwise.

Second, petitioner states that he moved to stay the related action and therefore "attempted to conserve judicial resources" by maintaining only one action for declaratory relief. (Pet. 8-9, 27-28) The statement is false. Petitioner's motion was not to stay the related action but, rather, was to stay the *effective date* of petitioner's removal from the hospital's medical staff *pending completion* of the related action. (Resp. App. 1-4) Similarly, petitioner did not "merely file, and then not seek to prosecute, the certiorari proceeding." (Pet. 19) Rather, petitioner's counsel did everything possible and appropriate to prosecute the certiorari

proceeding. The petition fails to inform the Court that, in the related action, Shahawy filed a 14-page petition (Resp. App. 5-20), The Hospital Board filed a 39-page response (Resp. App. 22-71), and petitioner filed an 18-page reply (Resp. 91-113). In fact, the only matter left before judicial resolution was oral argument. Petitioner, however, dismissed the appeal three days before the oral argument was to occur.

Third, throughout his brief, petitioner refers to alleged "non-record due process claims" which may only be addressed, says petitioner, by collateral attack on the Hospital Board's decision. (*see e.g.* Pet. 0, 11, 22, 27-28) Petitioner states that his proposed amended petition for declaratory relief raises those "non-record" claims. (Pet. 28) Contrary to petitioner's assertion, a side-by-side comparison of the claims asserted in the proposed amended petition for declaratory judgment (R. 56-59) and the claims asserted in the related action's appeal by certiorari (Resp. App. 5-20) reveals an exact identity of issues:

SHAHAWY'S CLAIMS	*PROPOSED COMPLAINT IN THIS CASE*	*PETITION IN RELATED ACTION*
1) The Executive Director did not concur in the summary suspension of Swan-Ganz privileges.	par. 7	pp. 3, 10
2) Instead of an Executive Committee hearing on the Swan-Ganz suspension, there was an investigation by an ad hoc committee.	par. 9	p. 4
3) Shahawy was not provided pertinent infor-		

	mation at various stages of the proceedings within the Hospital.	par. 10	p. 11
4)	Shahawy was not given a hearing before any medical staff committee.	par. 10	p. 10
5)	The Board's decision was not based on competent and substantial evidence.	par. 11	p. 12

Although the petition makes other misrepresentations and omissions, [4] the foregoing suffice to illustrate the nature of petitioner's allegations. These allegations will make difficult a decision by this Court on the basis of the *actual* facts below. Such is a significant reason for denying certiorari. "Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court." *Conway*, 396 U.S. at 110.

C. Well-Settled Principles of State Law Support The Lower Court's Ruling.

Declining to issue an opinion, the state appellate court presented no definitive reasons for its affirmance of the trial court's decision. However, established principles sup-

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[4]For example, even though the record demonstrates that the "court" in the related action was the Florida *circuit* court sitting in its appellate capacity (Resp. App. 5), and petitioner so acknowledges (Pet. 8), the petition constantly refers to the court as the *"county"* court. (*see, e.g.* Pet. 11, 16, 20).

port the affirmance. *See Escarra v. Winn Dixie Stores, Inc.*, 131 So. 2d 483 (Fla. 1961).

1. In Florida, Quasi-Judicial Local Administrative Agency Action Is Reviewable Only By Common Law Certiorari.

It is settled in Florida that quasi-judicial administrative action of a local agency is reviewable only by common law certiorari to the circuit court in its appellate capacity. *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957); *Board of County Commissioners v. Casa Development, Ltd.*, 332 So. 2d 651 (Fla. 2d DCA 1976). Quasi-judicial action is defined as a proceeding

> held upon notice at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process, including the right to present evidence and to cross-examine adverse witnesses, and the judgment of the agency or board should be contingent upon the showing made at the hearing.

Casa Development, Ltd., 332 So. 2d at 654; *accord DeGroot v. Sheffield.* Furthermore, appellate review by certiorari of local agency action is mandatory. The Florida circuit court must determine whether the agency:

1. Accorded procedural due process;
2. Observed the essential requirements of law; and
3. Supported its findings by substantial competent evidence.

Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So. 2d 684, 689 (Fla. 4th DCA 1982).

Under the foregoing authorities, a party aggrieved by agency action may not collaterally attack the action by declaratory

judgment proceeding but is limited to appellate review in the circuit court by certiorari. [5]

In the related action, the Hospital Board acted in a quasi-judicial fashion by holding a hearing at which petitioner was given a fair opportunity to be heard, was given the right to present evidence, and was given the right to cross-examine witnesses. Moreover, the Hospital Board made findings of fact and conclusions of law based upon evidence presented at the hearing, and it founded its decision thereon. Accordingly, petitioner's only remedy was a direct appeal to the circuit court. [6]

2. Shahawy Was Estopped, By Filing The Related Action, From Seeking Alternative Relief.

For the purpose of this section, let us assume that petitioner could choose different paths for review of the Hospital Board's action—direct appeal on one hand and collateral at-

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[5]The only exception to this rule is that, if a party challenges the constitutional validity of the *agency's enabling legislation*, he may assert that issue in a collateral proceeding. *Key Haven Assocd. Enters., Inc. v. Board of Trustees*, 427 So. 2d 153 (Fla. 1982). Petitioner does not challenge the Hospital Board's enabling statute here.

[6]It is of no consequence that petitioner claims "absolute" a physician's right to challenge a denial of staff privileges by declaratory judgment action. (Pet. 23-25) The Florida cases cited for this proposition involve *private* hospitals where no other review is available. Carida v. Holy Cross Hospital, Inc., 427 So. 2d 803 (Fla. 4th DCA 1983); Margolin v. Morton F. Plant Hosp. Ass'n, Inc., 348 So. 2d 57 (Fla. 2d DCA 1977). Conversely, this case involves review of local *governmental* administrative action where the proper method of review is clearly established.

tack on the other. Even so, Florida Law holds that the election and prosecution of one remedy precludes the other. In *Key Haven Associated Enterprises, Inc. v. Board of Trustees,* 427 So. 2d 153 (Fla. 1982), the Supreme Court of Florida considered a challenge to the facial constitutionality of an agency's enabling statute. When such a challenge is made, a party may choose either to seek relief by direct appeal or by declaratory judgment. The court warned:

> We note, however, that once a party chooses one or the other alternative, he is foreclosed from proceeding with the alternative remedy.

Id. at 157; *see State v. Atlantic International Investment Corp.*, 438 So. 2d 868 (Fla. 1st DCA 1983).

Under the facts now before the Court, even if Shahawy had possessed the right to pursue declaratory relief, he was precluded from doing so after he filed and prosecuted the certiorari proceeding.

Notwithstanding the foregoing premise, petitioner argues that the declaratory judgment action was the "prior-filed" suit and that the direct appeal in the related case was the "latter-filed" suit. Thus, petitioner urges, he elected declaratory relief first. This "before-filed"/"after-filed" argument is of no help to petitioner. As previously pointed out, the initial petition for injunction was solely to stop the Hospital Board hearing in the related case. The petition did not contain a plea for declaratory relief. In fact, it was not until *after* petitioner's direct appeal was fully briefed and awaited only oral argument that petitioner filed the proposed petition for declaratory judgment. Accordingly, the trial and appellate courts below correctly denied petitioner's collateral attack guised as a motion to amend.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the District Court of Appeal of Florida, Second District, should be denied.

Respectfully submitted,

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